Office of Chief Counsel
Internal Revenue Service
Memorandum

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UILC: 2104.02-00- Revocable Transfers and Transfers within Three Years of Death

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to: Supervisory Attorney
Estate and Gift Tax
SE:S:SP:EG:EC:1202

from: Branch Chief, Branch 1
Office of Associate Chief Counsel (International)
CC:INTL:BO1

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subject: Inclusion of Gift Tax Paid within Three Years of Death in the Estate of a Nonresident Alien

This Chief Counsel Advice responds to your request for assistance in determining whether § 2035(b) of the Internal Revenue Code (the "Code") applies to the U.S. estate of a nonresident not citizen decedent pursuant to § 2104(b) of the Code. The Office of the Associate Chief Counsel (International) has coordinated this issue with the Office of the Associate Chief Counsel (Passthroughs & Special Industries), and agrees with the analysis provided by it, as set out below. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice may not be used or cited as precedent.

ISSUE

Does § 2035(b), which includes in the gross estate of a decedent the amount of any gift tax paid with respect to gifts made within three years of death, apply to a nonresident not citizen decedent's U.S. estate pursuant to § 2104(b)?

CONCLUSION

We conclude that § 2035(b) does not apply to the payment of a gift tax made by a nonresident not citizen individual within three years of death, so that the amount of the gift tax is not includible in the U.S. estate of such a nonresident not citizen decedent.

LAW

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States. Section 2033 provides that the value of the gross estate includes the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2035(a) provides that if (1) the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent's death, and (2) the value of such property (or an interest therein) would have been included in the decedent's gross estate under §§ 2036, 2037, 2038, or 2042 if such transferred interest or relinquished power had been retained by the decedent on the date of his death, the value of the gross estate shall include the value of any property (or interest therein) which would have been so included.

Section 2035(b) provides that the amount of the gross estate shall be increased by the amount of any tax paid under chapter 12 by the decedent or his estate on any gift made by the decedent or his spouse during the 3-year period ending on the date of the decedent's death.

Section 2101 imposes a tax on the transfer of the taxable estate (determined as provided in § 2106) of every decedent nonresident not a citizen of the United States, except as provided in § 2107.

Section 2103 provides that, for purposes of § 2101, the value of the gross estate of every decedent nonresident not a citizen of the United States shall be that part of his gross estate (determined as provided in § 2031) which at the time of his death is situated in the United States.

Section 2104(b) provides that, for purposes of subchapter B (relating to estates of nonresidents not citizens) any property of which the decedent has made a transfer, by trust or otherwise, within the meaning of §§ 2035 to 2038, inclusive, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or at the time of the decedent's death. Treasury Regulation § 20.2104-1(a) provides rules regarding when property is deemed situated in the United States.

ANALYSIS

Sections 2035 through 2038 are part of the estate tax regime under chapter 11 and are applicable to "every decedent who is a citizen or resident of the United States". Under § 2103, the property of a decedent who was a nonresident not a citizen that is situated in the United States is includible in his U.S. gross estate. Section 2104(b) defines property within the United States by incorporating the rules under §§ 2035 to 2038 for purposes of determining whether property transferred by a nonresident will be

deemed to be situated in the United States (for purposes of inclusion under § 2103). Although § 2104(b) refers to § 2035, it does not expressly refer to § 2035(b).

We believe that the language in § 2104(b), *i.e*., any property of which the decedent has made a "transfer…within the meaning of §§ 2035 to 2038", requires that the decedent gratuitously transfer such property before it will be deemed situated in the United States. For the following reasons, it is our opinion that the payment of a gift tax at issue here would not be a transfer within the meaning of §§ 2035 to 2038, for purposes of § 2104(b).

Historically, § 2035(a) was intended as a "contemplation of death" statute that requires a decedent's executor to include in the decedent's gross estate property transferred before death in order to deplete the estate. Sections 2036 through 2038 are estate tax transfer sections under which a decedent's gratuitous transfer of property is includible in his gross estate because he retained (or otherwise held at death) economic benefits, rights, or uses in the property. Section 2035(b) was designed to reverse the effect of transfers made out of the estate within three years of death. Brown v. United States, 329 F.3d 664 (9th Cir. 2003). The legislative history of that section states that the section was enacted to eliminate the incentive to make deathbed transfers that remove an amount equal to the gift tax from the decedent's transfer tax base. H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 12 (1976).

Section 2035(a) applies to property gratuitously transferred by a decedent in the three years preceding his death. Section 2035(b) applies to the gift tax paid on property gratuitously transferred by a decedent in the three year period preceding his death. The payment of gift tax is not a gratuitous transfer. Read literally, the applicability of § 2035(b) does not depend on a "transfer" of the gift tax payment. In contrast, § 2035(a) applies only if there was a transfer of economic benefits, rights or uses, and the underlying property would have been otherwise includible in the decedent's gross estate under §§ 2036 through 2038. The distinction is significant because Congress, in enacting the gift tax, intended the words "transfer by gift" to comprehend transactions to the extent that "property or a property right is donatively passed to or conferred upon another." H.R. REP. NO. 708, 72nd Cong., 1st Sess. 27-28 (1932); S. REP. NO. 665, 72nd Cong., 1st Sess. 39 (1932). Thus, for estate and gift tax purposes, a transfer requires a gratuitous transfer in some manner from a donor to a donee. *See* Estate of Sanford v. Commissioner, 308 U.S. 39 (1939) ("The gift tax [is] supplementary to the estate tax. The two are in *pari materia* and must be construed together.") Based on the legislative purpose of the gift tax, and the language of §§ 2035(a) and 2035(b), the transfers considered under § 2104(b) logically apply to transfers under § 2035(a).

There is further support for the conclusion that the gift tax payment is not a gratuitous transfer within the meaning of § 25.2511-1 of the Gift Tax Regulations. That section states that "the gift tax is an excise tax on the [gratuitous] transfer. . . ." In Dickman v. Commissioner, 465 U.S. 330, 340 (1984), the United States Supreme Court opined that the gift tax is a tax on the gratuitous transfer of property. It is a payment

made to satisfy the donor's own tax liability. In Diedrich v. Commissioner, 457 U.S. 191 (1982), the Court stated that a donor who makes a gift to a donee is considered to have incurred a debt to the United States for the amount of the gift tax. This tax is the same kind of debt obligation as the income tax. This rationale, *i.e.*, that the gift tax payment is not considered a component of the donor's gift to the donee, is also supported by the fact that the gift tax is calculated using a tax exclusive method (the applicable rate is applied to the net gift, exclusive of gift taxes), whereas estate taxes are calculated on a tax inclusive method (the applicable rate is applied to the gross estate before taxes are deducted). Brown v. United States, 329 F.3d at 668.

Consequently, we conclude that the payment of gift tax considered made under § 2035(b) is not a transfer within the meaning of §§ 2035 to 2038. Thus, it is not property that is deemed situated in the United States at the time of payment of the tax under § 2104(b). Accordingly, the nonresident not citizen decedent's gross estate is not increased by the amount of the gift tax paid by such individual on a gift made during the three year period ending on the date of the nonresident not citizen decedent's death.

The opinions in this memorandum pertaining to the federal estate tax apply only to the extent that the relevant sections of the Code are in effect during the period at issue.

If you have any comments or questions please call Branch 1 of the Office of the Associate Chief Counsel (International) at (202) 622-3880, or Branch 4 of the Office of the Associate Chief Counsel (Passthroughs & Special Industries) at (202) 622-3090.

This document may not be used or cited as precedent. Section 6110(j)(3) of the Internal Revenue Code.